

THE HONORABLE RICHARD A. JONES

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

JILL ALEXANDER, an individual,  
Plaintiff,

vs.

THE BOEING COMPANY, a corporation  
doing business in the State of Washington,  
Defendant.

NO. 2:13-CV-01369

**PLAINTIFF'S MOTION FOR  
PROTECTIVE ORDER AND  
MOTION TO SEAL MEDICAL  
RECORDS**

**NOTED: OCTOBER 4, 2013**

**INTRODUCTION**

Plaintiff, Jill Alexander, respectfully moves this Court for a Protective Order and an Order Quashing Subpoenas which would limit Defendant's access to her medical records to the past five (5) years and prohibit the disclosure of her psychological and/or psychiatric records. Counsel for the parties have conferred in accordance with Federal Rule of Civil Procedure 37. Unfortunately, the parties were unable to reach an agreement. Weiss Dec.

Plaintiff further requests that the Court enter an Order sealing Plaintiff's medical records. Defendant has advised that it intends to file Plaintiff's medical records as exhibits to its response to this motion. Medical Records are inherently private and confidential and Plaintiff has not waived her privilege with respect to them. The parties have also conferred on

**PLAINTIFF'S MOTION FOR PROTECTIVE  
ORDER AND MOTION TO SEAL- 1**

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1 this issue and were unable to reach agreement. Plaintiff requests an award of attorney's fees  
2 for bringing this motion, which should have been unnecessary.

3 **FACTS<sup>1</sup>**

4 Plaintiff was employed with Defendant for approximately seventeen (17) years until she  
5 was involuntarily terminated on May 3, 2013. Plaintiff held a full time, permanent position as  
6 a Procurement Manager at the time of her termination.

7 Plaintiff suffers from a serious health condition and disability, namely migraine  
8 headaches. She requires continuing treatment from her health care providers for this condition.  
9 During the relevant years, 2011 -2013, Plaintiff missed approximately one to three days of  
10 work twice per month, and sometimes more, due to her disability. Plaintiff used accrued sick  
11 and vacation leave, short term disability and leave without pay to cover these absences.

12 In June 2012, Plaintiff received a document from Defendant approving her use of  
13 intermittent leave pursuant to the Washington Family Leave Act ("WFLA") and the Family  
14 and Medical Leave Act ("FMLA") between June 20, 2012 and December 19, 2012. Relying  
15 upon the representation that she was approved for leave, Plaintiff took WFLA/FMLA leave  
16 between June 25 and 27, 2012. On or about June 28, 2012, Plaintiff received notice from  
17 Defendant that her absence on June 25, 2012 was not approved for WFLA/FMLA leave.  
18 Defendant's letter indicated that she was denied leave due to "notified untimely". Defendant  
19 imposed disciplinary action on Plaintiff for her use of leave protected by the WFLA/FMLA.

20 In January 2013, Plaintiff was absent for three days due to her disability and serious  
21 medical condition, migraines. Plaintiff was initially assured that the leave would be protected  
22 by the WFLA/FMLA. After taking the leave, however, Defendant told Plaintiff that the leave

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24 <sup>1</sup> The substantive facts are set forth in Plaintiff's Complaint.

1 was not protected under the WFLA/FMLA because she had not accrued 1250 hours in the  
2 previous year. Defendant imposed discipline of a five day suspension without pay for  
3 Plaintiff's use of medical leave in January 2013.

4 In April 2013, Plaintiff's physician wrote a letter to Defendant stating:

5 One of her primary issues is the unpredictable nature of migraine headaches and  
6 interference with work. these (sic) are severe rendering her incapable of working  
7 during a migraine attack. ... It is my opinion that acomodations (sic) can be made  
8 for her during this difficult to control headache disorder.

9 Weiss Dec., Ex. A. At no time between 2011 and 2013 did Defendant offer Plaintiff an  
10 accommodation for her disability and serious health condition. Nor did Defendant engage in  
11 an interactive discussion with Plaintiff regarding her disability and possible accommodations.  
12 Instead, Defendant suggested that Plaintiff step down from her management position due to her  
13 disability and serious health condition.

14 Plaintiff took an unpaid leave of absence between January 30, 2013 and April 26, 2013.  
15 Defendant advised Plaintiff that her five day unpaid suspension would run consecutive to her  
16 leave, beginning on April 29, 2013 and ending on May 3, 2013. Plaintiff was not to report to  
17 work during her suspension.

18 Plaintiff decided to extend her leave of absence based upon her doctor's  
19 recommendation. On or about April 18, 2013, Plaintiff received a letter from Defendant  
20 indicating that "[t]o extend your leave, your health care provider must complete and sign the  
21 enclosed Medical Certification form and fax it .... **no later than 05/03/2013.**" (emphasis in the  
22 original). Based upon this and Defendant's representations that her suspension ran from April  
23 29 to May 3, 2013, Plaintiff believed that even if she did not extend her unpaid leave per her  
24 doctor's instruction, she should not return to work at least until May 3, 2013. On May 3, 2013,

1 Plaintiff received a telephone call from Defendant advising her that her employment had been  
2 terminated for “abandonment”.

3 Plaintiff has brought causes of action for interference with rights under the Family and  
4 Medical Leave Act (FMLA) and the Washington Family Leave Act (WFLA); failure to  
5 accommodate in violation of the Washington Law Against Discrimination (WLAD), and  
6 discrimination and wrongful termination in violation of these statutes. Plaintiff has incurred  
7 damages including wage loss, “garden variety” emotional distress, liquidated damages,  
8 attorney’s fees and costs.

9 Defendant initially sent a medical release form to Plaintiff which would have released  
10 her medical records without any limitation whatsoever. See Weiss Dec., Ex. B. Upon  
11 objection to this overbroad release, Defendant proposed that Plaintiff agree to release her  
12 medical records for the past ten years, including psychological and psychiatric records.  
13 Plaintiff proposed a three year limit and when Defendant was not responsive to this proposal,  
14 Plaintiff offered to agree to a five (5) year limit for medical records, excluding psychological  
15 and psychiatric records. Defendant rejected that offer. It demands a 10 year release of all  
16 medical records, including psychological and psychiatric records. Weiss Dec.

17 On September 17, 2013, Defendant issued letters providing Notice of Intent to Subpoena  
18 Medical Records, including psychiatric and psychological records, to nine (9) of Plaintiff’s  
19 physicians, seeking records for the past ten years. See Weiss Dec, Ex. C. Plaintiff objects to  
20 this overbroad subpoena and therefore brings this motion.<sup>2</sup>

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23 <sup>2</sup> Plaintiff has written to the providers, indicating her objection and asking that they wait until they receive an Order  
24 from this Court before providing records.

1 Finally, Defendant refuses to cooperate regarding the public disclosure of Plaintiff's  
2 medical records in the Court file. Defendant has in its possession confidential medical records  
3 obtained during the course of Plaintiff's employment. On September 20, 2013, Defendant  
4 indicated that, in its response to Plaintiff's motion, it will file exhibits containing some of these  
5 medical records. Defendant will not agree to mark those records confidential or file them  
6 under seal without an order from the court. Weiss Dec.

### 7 **LAW AND ANALYSIS**

8 Federal Rules of Civil Procedure 26(c) provides that a party may obtain a protective  
9 order to protect a party from annoyance, embarrassment, oppression, or undue burden or  
10 expense by "forbidding inquiry into certain matters, or limiting the scope of disclosure or  
11 discovery to certain matters." Fed. R. Civ. P. 26(c) (1)(D). Fed. R. Civ. P. 45(c)(3)(A)(iii)  
12 provides that the court must quash or modify a subpoena that requires disclosure of privileged  
13 or other protected matter, if no exception or waiver applies. Plaintiff respectfully requests that  
14 the Court order that disclosure of her medical records, excluding psychiatric and/or  
15 psychological records, be limited to the past five (5) years. Plaintiff further requests that the  
16 Court order Defendant to file her medical records under seal.

- 17 1. *The federal common law of privileges governs because the information sought*  
18 *is relevant to both state and federal claims.*

19 In federal question cases where a plaintiff raises pendent state claims, and the  
20 information sought is relevant to both the state and federal claims, the federal common law of  
21 privileges will govern. Perrignon v. Bergen Brunswig Corp., 777 F.R.D. 455, 459 (N.D. Cal.  
22 1978). *See also*, Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 n.10 (9th Cir. 1992)  
23 (the federal courts will recognize state privileges only in cases in which state law supplies the  
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rule of decision); Zamorano v. Wayne State Univ., 2008 WL 2067005 (E.D. Mich. May 15, 2008) (even in a case where the plaintiffs are alleging violations of state law in addition to violations of federal law, federal courts look to federal law to determine the applicable privileges); Lahrichi v. Lumera Corp., 2005 WL 2898145 (W.D. Wash. 2005)(federal privilege law applies where court exercises supplemental jurisdiction over pendent state law claims).

Plaintiff has alleged violations of a federal statute, FMLA, as well as pendent state claims, WFLA and WLAD. Pursuant to Religious Tech. Ctr. v. Wollersheim, and other cited cases, the federal rule of privileges applies where there are federal and pendant state claims. Therefore, the federal law of privileges applies in this instance.

2. *Plaintiff has claimed only “garden variety” emotional distress. Therefore, pursuant to the federal privilege rule, her psychological records are not discoverable.*

The U.S. Supreme Court formally recognized the psychotherapist-patient privilege in Jaffee v. Redmond, 518 U.S. 1 (1996), holding that “[c]onfidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure[.]” Jaffee, 518 U.S. 1 at 15. The Supreme Court in Jaffee stated that a patient may waive the psychotherapist-patient privilege, Jaffee, 518 U.S. at 15, n. 4, but did not address whether a plaintiff waives the privilege by claiming emotional distress damages.

District Courts within the Ninth Circuit apply either a “broad approach” or a “narrow approach” to waiver. Courts taking the narrow approach have found that where, as here, a plaintiff alleges only “garden variety” emotional distress damages (*i.e.*, where plaintiffs do not assert that defendants’ discrimination caused any specific mental or medical conditions), without relying on medical records or medical expert testimony for proof at trial, the psychotherapist-patient privilege is not waived. *See, e.g.*, Fitzgerald v. Cassil, 216 F.R.D. 632

1 (N.D. Cal. 2003). By contrast, under the “broad approach,” courts have held that a simple  
2 allegation of emotional distress constitutes waiver. *See, e.g., Doe v. City of Chula Vista*, 196  
3 F.R.D. 562 (S.D. Cal. 1999).

4 District Courts in the Ninth Circuit determine whether to apply the narrow or broad  
5 approach to waiver on a case-by-case basis. Two cases support the application of the narrow  
6 approach in this case. In EEOC v. California Psychiatric Transitions, 258 F.R.D. 391 (E.D.  
7 Cal. 2009), the court applied the broad approach and required a plaintiff asserting sexual  
8 harassment and retaliation claims under Title VII to produce her medical records where (1) the  
9 only remedy the EEOC was seeking on behalf of the plaintiff was emotional distress damages  
10 resulting from the alleged harassment and (2) the plaintiff was being treated for her diagnosed  
11 clinical depression, suggesting a possible “multiple causation” issue. California Psychiatric  
12 Transitions, 258 F.R.D. at 400 (“[t]he emotional distress [Plaintiff] allegedly suffered as a  
13 result of the sexual harassment could have been affected by her depression and vice versa.”).

14 The Eastern District of Washington applied the narrow approach to waiver in a case  
15 where the only compensatory damages sought by the EEOC on the claimant’s behalf were for  
16 emotional distress. *See EEOC v. Wal-Mart Stores, Inc.*, 276 F.R.D. 637, (E.D. Wash. 2011).  
17 The court distinguished California Psychiatric Transitions because in that case, “[the] plaintiff  
18 claiming Title VII discrimination was also being treated for depression, so multiple causation  
19 was clearly an issue...” Wal-Mart Stores, 276 F.R.D. at 641. Finding no such “multiple  
20 causation” issues in the case before it, the court went on to apply the narrow approach to  
21 waiver:

22 This Court finds that the “narrow” approach referenced above is the appropriate  
23 manner to determine if Plaintiff waived Mr. Nichols' privilege. *See Fitzgerald*, 216  
24 F.R.D. at 639. Applying that approach, in light of the garden-variety emotional  
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1 distress damages claimed by Plaintiff's amended complaint and Plaintiff's intention  
2 to support those damages through evidence other than medical records or expert  
3 testimony, Plaintiff has not waived the privilege attaching to Mr. Nichols'  
4 communications with his physicians and/or psychotherapists. Furthermore, there is  
no affirmative reliance by Plaintiff on the privileged communications that would  
support Defendant's discovery request. Consequently, the Court declines to compel  
Plaintiff to produce any medical records at this time.

5 E.E.O.C. v. Wal-Mart Stores, Inc., 276 F.R.D. 637, 641 (E.D. Wash. 2011).

6 Plaintiff likewise has no multiple causation issues. Between 2011 and 2013, she has not  
7 been diagnosed with, nor sought treatment for, any psychological conditions that might have  
8 affected the emotional distress that she suffered as a result of Defendant's wrongful conduct in  
9 2013. Alexander Dec. Plaintiff does not intend to rely upon medical testimony or records to  
10 support her allegation of emotional distress. Weiss Dec. Accordingly, the court should apply  
11 the narrow approach to waiver and preclude discovery of Plaintiff's psychological and  
12 psychiatric records.

13 Application of the psychotherapist-patient privilege will not cause undue prejudice to  
14 Defendant. "The defendant has numerous avenues through which it can make its case without  
15 delving into the plaintiff's confidential communications." Fitzgerald v. Cassil, 216 F.R.D. 632,  
16 638 (N.D. Cal. 2013). Defendant can cross-examine Plaintiff about other contributing factors  
17 that may have affected her emotional state; it can examine percipient witnesses; or it may elicit  
18 that the plaintiff did not seek therapy or treatment after being wrongfully terminated. *See, id.* at  
19 638.

20 In sum, plaintiff's psychotherapy records are privileged. The privilege has not been  
21 waived because Plaintiff has alleged only "garden variety" emotional distress and does not  
22 intend to rely upon medical testimony or records in support of her claim of emotional distress.



1 The court should grant Plaintiff's motion for protective order and prohibit the production of  
2 any of plaintiff's psychotherapy records, regardless of time frame.<sup>3</sup>

3 3. *Defendant's subpoena of Plaintiff's medical records for the past 10 years is*  
4 *overbroad and should be limited to the past 5 years.*

5 Plaintiff's allegations are limited to the years 2011-2013. There is no good reason for  
6 Defendant to obtain her psychological or medical records dating back to 2003. This tactic is  
7 nothing more than a "fishing expedition" and should not be condoned.

8 Because Plaintiff has alleged a disability and serious health condition, Plaintiff  
9 acknowledges that some of her records are relevant and discoverable. Plaintiff, in an attempt  
10 to compromise, has offered to release her records dating back five (5) years, but Defendant  
11 insists upon records dating back ten years. Plaintiff asks that the Court limit Defendant to  
12 review of five (5) years' records of Plaintiff's physical treatment only. Defendant cannot  
13 articulate a reason why it requires the release of ten years of medical and psychological records  
14 because there is no good reason to do so. The court should issue a protective order limiting  
15 the production of Plaintiff's medical records to the past five years.

16 4. *The Court should order Defendant to file Plaintiff's medical records under seal*  
17 *because they contain confidential information.*

18 Whether or not Plaintiff's records are privileged from disclosure to Defendant, they are  
19 sensitive and confidential documents. Defendant has nevertheless advised that it intends to file  
20 Plaintiff's medical records as an exhibit in response to this motion without any protection  
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22 <sup>3</sup> Defendant has subpoenaed both psychological records and psychiatric records dating back ten years. Plaintiff's  
23 former psychiatrist, however, has informed her that he has no records dating back ten years and that he destroys  
24 records after seven (7) years. Weiss Dec.

1 whatsoever. Defendant refuses to acknowledge that Plaintiff's medical records are  
2 confidential. Weiss Dec., Ex. D.

3 Psychotherapy records are confidential and privileged pursuant to Jaffee v. Redmond,  
4 518 U.S. 1 (1996). Medical records are confidential and privileged pursuant to a number of  
5 cases, including Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1186 (9th Cir.  
6 2006)(denying motion to seal records except for medical records); Abbey v. Hawaii Employers  
7 Mut. Ins. Co. (HEMIC), 760 F. Supp. 2d 1005, 1013 (D. Haw. 2010)("The need to protect  
8 medical privacy qualifies as a 'compelling reason' that overcomes the presumption of public  
9 access to judicial records"); Lombardi v. TriWest Healthcare Alliance Corp., CV 08-02381,  
10 2009 WL 1212170, at \*1 (D.Ariz. May 4, 2009) (allowing defendant to file under seal exhibits  
11 containing "sensitive personal and medical information") (citing Kamakana, 447 F.3d at 1179).

12 Plaintiff's medical records are plainly confidential. Defendant's refusal to file Plaintiff's  
13 medical records under seal evidences bad faith on the part of Defendant. The Court should  
14 order Defendant to file Plaintiff's medical records under seal.

15 5. *Plaintiff should be awarded fees for bringing this motion.*

16 Plaintiff should not have had to bring this motion where it is clear that medical records  
17 dating back to 2003 are irrelevant and not likely to lead to the discovery of admissible  
18 evidence. Furthermore, it is clear that under federal law, a claim of "garden variety" emotional  
19 distress does not lead to the waiver of the psychotherapist – patient privilege. Plaintiff does  
20 not intend on offering medical evidence or records in support of her emotional distress claim.  
21 She does not currently have a psychiatric diagnosis nor is she in therapy. Therefore, there is no  
22 evidence to support Defendant's contention that Plaintiff has waived her privilege. Plaintiff  
23 respectfully requests that the Court order payment of attorney fees for bringing this motion.

1 **CONCLUSION**

2 Plaintiff has alleged only “garden variety” emotional distress. She does not intend to  
3 offer medical testimony or records to support her claim of emotional distress resulting from  
4 Defendant’s bad conduct. *Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. Cal. 2013). It is clear  
5 that given these facts, Plaintiff has not waived that privilege.

6 Plaintiff has agreed to produce the past five years of other medical records but  
7 Defendant insists on the past ten years. There is no good reason that Defendant should obtain  
8 Plaintiff’s medical records dating back ten years. The Court should limit production of  
9 Plaintiff’s medical records to the past five years.

10 Plaintiff’s medical records are clearly confidential and should be filed under seal.  
11 Defendant refuses to do so unless so ordered by the Court. Plaintiff respectfully urges the  
12 Court to issue an order requiring Defendant to file Plaintiff’s medical records under seal.

13 Finally, Plaintiff requests that she be awarded attorney’s fees for bringing this motion.

14 Respectfully submitted this 26<sup>th</sup> day of September, 2013.

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16  
17 Reba Weiss, WSBA #12876  
18 Teller & Associates  
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

On September 26, 2013, I caused to be served via Email, upon counsel of record at the address stated below, a true and correct copy of Plaintiff's Motion For Protective Order and Motion to Seal:

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Attorneys for Defendant

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26<sup>th</sup> day of September, 2013.



Reba Weiss, WSBA #12876  
Teller & Associates  
Attorneys for Plaintiffs